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No. 98-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RALPH RICHARDSON,

Petitioner,

V.

JANET RENO, ATTORNEY GENERAL, *ET AL.*

Respondents.

On Writ Of Certiorari
To the United States Court of Appeals
For The Eleventh Circuit

REPLY BRIEF OF THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

For more than sixteen months the Petitioner Ralph Richardson has sought in vain the right to have a bail hearing before a neutral magistrate to determine his fitness to be released pending a final determination of his status in the United States.[1]

After vigorously challenging Mr. Richardson's right to be released at every turn, including obtaining an emergency stay of the district court decision granting him a bail hearing, the Respondents now concede that the decision they doggedly pursued below should be vacated. However, rather than concede that the mandatory detention statute is

[1] There have been very recent new developments in Mr. Richardson's underlying removal proceeding, however. On May 5, 1999, Mr. Richardson was notified that the Board of Immigration Appeals ("BIA") had sustained his appeal in part and remanded his case for further proceedings before an Immigration Judge ("IJ"). The BIA sustained his appeal on the grounds that, contrary to the IJ's finding, there was no record in the case that Mr. Richardson had been convicted of an aggravated felony. Petitioner, nonetheless, remains in mandatory detention and in removal proceedings which, inevitably, will be further elongated.

unconstitutional, they seek a remand to the court of appeals to re-address issues that the lower court has already addressed and to re-brief issues that have already been briefed. Other than punishing Mr. Richardson by delaying the resolution of the legality of his continuing incarceration, there is no purpose in remanding this case back to the lower court when that court has already addressed all the issues that Petitioner seeks to address on certiorari. This Court should grant certiorari and address the constitutionality of mandatory detention and jurisdiction and summarily reverse or set this case for its earliest possible docket rather than remanding it to the Court of Appeals.[2]

I. The Circuit Court Addressed The Constitutionality Of Mandatory Detention And No Purpose, Other Than Further Delay, Would Be Served By Remanding That Question To The Circuit Court

The panel below directly addressed the question of the constitutionality of mandatory detention pursuant to INA § 236(c)(1). The lower court expressly found that Mr. Richardson's conviction "brings him within several mandatory detention categories in INA § 236(c)(1)" and that "he does not fall within the discretionary release option in INA § 236(c)(2)." (App. 29-30). Having determined that he is subject to mandatory detention, the panel, misciting *Carlson v. Landon*, 342 U.S. 524 (1952), found that mandatory detention "poses no constitutional issue." (App. 60n. 119, 100).

The Respondents, although conceding that the appeals court *did* address the constitutionality of mandatory detention,

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[2] Respondent's submission to this Court inappropriately attaches materials that have never been made a part of the record in the detention proceeding before the INS in this case. The 11th circuit under the mistaken belief that removal hearings and bond hearings were one and the same ordered the parties, subsequent to briefing and oral argument, to provide the court with a "record" of the removal proceeding. All of the Respondent's attachments, accordingly, should be excluded from this Court's consideration.

Brief for the Respondents ("Br.R.") at 16, nonetheless argue that the case should be remanded because "the parties did not brief any questions relating to the permanent mandatory-detention rules." *Id.* However, the Respondents successfully argued precisely the opposite position below. In their brief in opposition to Mr. Richardson's motion for supplemental briefing below, the Respondents argued successfully that the request for supplemental briefing on the constitutionality of mandatory detention was "wholly inappropriate" because Respondents "did address Richardson's constitutional claims in their Brief for Defendants/Appellants . . . at 29-34." Defendants/Appellants' Opposition To Plaintiff/Appellee's Motion For Supplemental Briefing ("Opp.Br.") at 2. Further, contradicting what the respondents have said in this Court, they argued below that "the expiration of the TPCR does not change the nature of the issues already addressed" and that "there is no need to prolong the litigation with further briefing." Opp.Br. at 3, 4. The lower court, apparently accepting the Respondents' argument that the issues had been briefed, denied the motion for supplemental briefing and reached the issue concerning the constitutionality of INA §236(c).

The Solicitor also argues that there is no conflict in the circuits on the application of the mandatory-detention provisions that would otherwise warrant the Court's review. Br.R. at 17. The mandatory detention provision, however, directly conflicts with this Court's decisions and jurisprudence regarding substantive and procedural due process and Eighth amendment rights of incarcerated resident aliens. Petition For Writ of Certiorari at 20-27.

The Eleventh Circuit's holding on mandatory detention has a broad impact on thousands of persons currently detained. As of August 1998, the INS was detaining over 1400 aliens in the states of Florida, Georgia and Alabama. Daily Population Reports for August, 1998, INS Eastern Region, Detention and Deportation Division. As these detention statistics were generated prior to the mandatory

detention provisions of October, 1998, the current number within the Eleventh Circuit is likely to be far higher. Under the lower court's ruling, none of the thousands of people who have been detained since December 22, 1998 have a right to a bond hearing before an immigration judge or other neutral magistrate.

II. As the Lower Court Also Addressed All Jurisdictional Grounds In Determining That Habeas Corpus Jurisdiction For Persons Subject to Executive Detention Had Been Abolished, A Remand Would Be Inappropriate

The panel's opinion specifically and exhaustively addressed all conceivable jurisdictional grounds, in addition to INA §242(g), that it erroneously believed could apply to Mr. Richardson's case. App. 30-32 (addressing INA §236(e) but finding it inapplicable); App. 39-40 (finding INA 242(a)(2)(B)(ii) inapplicable to non-discretionary decisions); App. 35-37, 85-88 (finding INA § 242(b)(9) did apply and that the district court had no jurisdiction because of a statutory failure to exhaust). The Eleventh Circuit expressly and at length discussed its understanding of the effect of INA § 242(b)(9) on Mr. Richardson's habeas corpus claim. The panel found that "[N]either the district court nor this Court can override" the exhaustion requirement of INA § 242(b)(9) and that "[w]hen a statute requires exhaustion, a petitioner's failure to do so deprives this court of jurisdiction." App. 86. Richardson's claims, the panel concluded, "can be made in his direct petition for review in the court of appeals . . . Richardson does not need § 2241 habeas to do that." App. 88.[3]

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[3] The Eleventh Circuit, in denying Petitioner's motion for a withdrawal of its mandate and a stay, indicated that it was now of the opinion that further briefing on INA § 242(b)(9) would be "welcome." That suggestion should be afforded no weight by this Court, however, because the Court below had discussed INA § 242(b)(9) at length, and that issue had been fully briefed below. No further purpose would be served by additional argument except to delay this proceeding and extend Mr. Richardson's incarceration.

The Solicitor's claim, therefore, that it "is unclear whether the court of appeals intended to rule that Section 1252(b)(9) ["242(b)(9)"] constitutes an independent preclusion of district court review on habeas proceedings" is at best confusing and at worst misleading. Br.R. at 15-16. The Solicitor's claim that this Court should remand Mr. Richardson's case to the Court of Appeals to clarify its unmistakably clear ruling on INA § 242(b)(9) would unnecessarily prolong the final resolution of this issue.

In fact, INA § 242(b)(9) is inapplicable to this case for several reasons. First, unlike the language of INA § 242(g) the statute does not contain the language "Notwithstanding any other provision of law, no court shall have jurisdiction . . ." as does INA § 242(g) which the 11th circuit construed, under "the clear statement rule" of *Felker v. Turpin*, 518 U. S. 651 (1996) and *Ex parte Yerger*, 75 U.S. (8 Wall) 332 (1869) to bar habeas corpus jurisdiction. Second, statutory exhaustion requirements do not bar constitutional challenges to statutes where the agency has no mechanism, as here, for addressing those challenges. *Mathews v. Eldridge*, 424 U.S. 319, 328-30 (1976); *cf. Pastor-Camarena v. Smith*, 977 F. Supp. 1415, 1417 (W.D. Wash. 1997). Although this Court has described INA § 242(b)(9) as a "zipper clause," *Reno v. American-Arab Anti-Discrimination Committee*, 119 S. Ct. 936, 943 (1999), it may only be viewed in that manner to deprive a party of habeas review when review at the end of the process offers an effective remedy. *Swain v. Pressley*, 430 U.S. 372 (1972). Depriving Mr. Richardson of the right to challenge by habeas corpus the constitutionality of his detention on the grounds that all review must be consolidated in the court of appeals, would render review of his detention meaningless. By that time, he would either have been released for having won his removal proceeding or deported for having lost it. *See also Montero v. Cobb*, 937 F. Supp. 88, 91 (D. Mass. 1996) ("As [a] matter of law, there is no federal statute . . . that imposes an exhaustion requirement on pre-deportation detainees"). Moreover, the Department of Justice itself regards detention matters as separate and apart from removal proceedings, by

both regulation and precedent. 8 C.F.R. §3.19(d) (1999); *Matter of Joseph*, Int. Dec. #3387 (BIA 1999); *Matter of Valles*, Int. Dec. #3306 (BIA 1996). Thus, there is also no administrative reason to consolidate the matters.

CONCLUSION

This Court, as the Solicitor has agreed, should accept certiorari in this case. However, rather than remand this case for additional unnecessary briefing and proceedings on issues that the lower court has already extensively addressed, the lower court's decision should be summarily reversed, or the Court should set the matter for its earliest possible calendar.

Respectfully submitted,

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